

1 SENATE BILL 335

2 **54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

3 INTRODUCED BY

4 Peter Wirth and Melanie A. Stansbury

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10 AN ACT

11 RELATING TO TAXATION; REQUIRING COMBINED REPORTING FOR A
12 UNITARY GROUP; CHANGING REQUIREMENTS FOR CORPORATIONS TO FILE A
13 CONSOLIDATED RETURN; ADDING AND AMENDING DEFINITIONS IN THE
14 CORPORATE INCOME AND FRANCHISE TAX ACT; AMENDING THE UNIFORM
15 DIVISION OF INCOME TAX FOR TAX PURPOSES ACT TO DETERMINE IN-
16 STATE SALES OF INTANGIBLES AND SERVICES; REQUIRING THE TAXATION
17 AND REVENUE DEPARTMENT TO PROMULGATE RULES; AMENDING AND
18 REPEALING SECTIONS OF THE CORPORATE INCOME AND FRANCHISE TAX
19 ACT.

20
21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

22 SECTION 1. Section 7-2A-2 NMSA 1978 (being Laws 1986,
23 Chapter 20, Section 33, as amended) is amended to read:

24 "7-2A-2. DEFINITIONS.--For the purpose of the Corporate
25 Income and Franchise Tax Act and unless the context requires

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1 otherwise:

2 ~~[A. "affiliated group" means that term as it is~~
3 ~~used in the Internal Revenue Code;~~

4 ~~B.]~~ A. "bank" means any national bank, national
5 banking association, state bank or bank holding company;

6 B. "apportioned net income" or "apportioned net
7 loss" means net income or loss allocated and apportioned to New
8 Mexico pursuant to the provisions of the Corporate Income and
9 Franchise Tax Act or the Uniform Division of Income for Tax
10 Purposes Act, but excluding from the sales factor any sales
11 that represent intercompany transactions between members of the
12 filing group;

13 C. "base income or loss" means ~~[that part of the~~
14 ~~taxpayer's income defined as taxable income and upon which the~~
15 ~~federal income tax is calculated in the Internal Revenue Code~~
16 ~~for income tax purposes plus:~~

17 ~~(1) for taxable years beginning on or after~~
18 ~~January 1, 1991, the amount of the net operating loss deduction~~
19 ~~allowed by Section 172(a) of the Internal Revenue Code, as that~~
20 ~~section may be amended or renumbered, and claimed by the~~
21 ~~taxpayer for that year;~~

22 ~~(2) interest received on a state or local~~
23 ~~bond; and~~

24 ~~(3) the amount of any deduction claimed in~~
25 ~~calculating taxable income for all expenses and costs directly~~

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1 ~~or indirectly paid, accrued or incurred to a captive real~~
2 ~~estate investment trust]~~ the federal taxable income or the
3 federal net operating loss of a corporation for the taxable
4 year calculated pursuant to the Internal Revenue Code, after
5 special deductions but without any deduction for net operating
6 losses, as if the corporation filed a federal tax return as a
7 separate domestic entity, modified as follows:

8 (1) adding to that income or loss:

9 (a) interest received on a state or
10 local bond exempt under the Internal Revenue Code;

11 (b) the amount of any deduction claimed
12 in calculating taxable income for all expenses and costs
13 directly or indirectly paid, accrued or incurred to a captive
14 real estate investment trust; and

15 (c) the amount of any deduction, other
16 than for premiums, for amounts paid directly or indirectly to a
17 commonly controlled entity that is exempt from corporate income
18 tax pursuant to Section 7-2A-4 NMSA 1978;

19 (2) subtracting from that income or loss:

20 (a) income from obligations of the
21 United States net of expenses incurred to earn that income; and

22 (b) other amounts that the state is
23 prohibited from taxing because of the laws or constitution of
24 this state or the United States net of any related expenses;

25 and

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1 (3) making other adjustments deemed necessary
2 to properly reflect income of the unitary business, including
3 attribution of income or expense related to unitary assets held
4 by related corporations that are not part of the filing group;

5 D. "captive real estate investment trust" means a
6 corporation, trust or association taxed as a real estate
7 investment trust pursuant to Section 857 of the Internal
8 Revenue Code, the shares or beneficial interests of which are
9 not regularly traded on an established securities market;
10 provided that more than fifty percent of any class of
11 beneficial interests or shares of the real estate investment
12 trust are owned directly, indirectly or constructively by the
13 taxpayer during all or a part of the taxpayer's taxable year;

14 E. "common ownership" means the direct or indirect
15 control or ownership of more than fifty percent of the
16 outstanding voting stock, ownership of which shall be
17 determined pursuant to Section 1563 of the Internal Revenue
18 Code, as that section may be amended or renumbered, of:

19 (1) a parent-subsidiary controlled group as
20 defined in Section 1563 of the Internal Revenue Code, except
21 that fifty percent shall be substituted for eighty percent;

22 (2) a brother-sister controlled group as
23 defined in Section 1563 of the Internal Revenue Code; or

24 (3) three or more corporations each of which
25 is a member of a group of corporations described in Paragraph

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1 (1) or (2) of this subsection, and one of which is:

2 (a) a common parent corporation included
3 in a group of corporations described in Paragraph (1) of this
4 subsection; and

5 (b) included in a group of corporations
6 described in Paragraph (2) of this subsection;

7 F. "consolidated group" means the group of entities
8 properly filing a federal consolidated return under the
9 Internal Revenue Code for the taxable year;

10 ~~[E-]~~ G. "corporation" means corporations, joint
11 stock companies, real estate trusts organized and operated
12 under the Real Estate Trust Act, financial corporations and
13 banks, other business associations and, for corporate income
14 tax purposes, partnerships and limited liability companies
15 taxed as corporations under the Internal Revenue Code;

16 ~~[F-]~~ H. "department" means the taxation and revenue
17 department, the secretary of taxation and revenue or any
18 employee of the department exercising authority lawfully
19 delegated to that employee by the secretary;

20 I. "filing group" means the group of corporations
21 properly included in the return for a taxpayer for a particular
22 taxable year;

23 ~~[G-]~~ J. "fiscal year" means any accounting period
24 of twelve months ending on the last day of any month other than
25 December;

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1 K. "grandfathered net operating loss carryover"

2 means:

3 (1) the amount of net loss properly reported
4 to New Mexico in taxable years beginning January 1, 2014 and
5 prior to January 1, 2020 as part of a timely filed original
6 return, to the extent such loss can be attributed to one or
7 more corporations that are properly included in the taxpayer's
8 return for the first taxable year beginning on or after January
9 1, 2020;

10 (2) reduced by:

11 (a) adding back deductions that were
12 taken by the corporation or corporations for royalties or
13 interest paid to one or more related corporations, but only to
14 the extent that such adjustment would not create a net loss for
15 such related corporations; and

16 (b) the amount of net operating loss
17 deductions taken prior to January 1, 2020, that would be
18 charged against those losses consistent with the Internal
19 Revenue Code and provisions of the Corporate Income and
20 Franchise Tax Act applicable to the year of the deduction; and

21 (3) apportioned to New Mexico using the
22 apportionment factors that can properly be attributed to the
23 corporation or corporations for the year of the net loss;

24 [~~H.~~] L. "Internal Revenue Code" means the United
25 States Internal Revenue Code of 1986, as amended;

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1 ~~[F.]~~ M. "net income or loss" means: ~~[base income~~
2 ~~adjusted to exclude:~~

3 ~~(1) income from obligations of the~~
4 ~~United States less expenses incurred to earn that income;~~

5 ~~(2) other amounts that the state is prohibited~~
6 ~~from taxing because of the laws or constitution of this state~~
7 ~~or the United States;~~

8 ~~(3) for taxable years that began prior to~~
9 ~~January 1, 1991, an amount equal to the sum of:~~

10 ~~(a) net operating loss carryback~~
11 ~~deductions to that year from taxable years beginning prior to~~
12 ~~January 1, 1991 claimed and allowed, as provided by the~~
13 ~~Internal Revenue Code; and~~

14 ~~(b) net operating loss carryover~~
15 ~~deductions to that year claimed and allowed;~~

16 ~~(4) for taxable years beginning on or after~~
17 ~~January 1, 1991 and prior to January 1, 2013, an amount equal~~
18 ~~to the sum of any net operating loss carryover deductions to~~
19 ~~that year claimed and allowed; provided that the amount of any~~
20 ~~net operating loss carryover from a taxable year beginning on~~
21 ~~or after January 1, 1991 and prior to January 1, 2013 may be~~
22 ~~excluded only as follows:~~

23 ~~(a) in the case of a timely filed~~
24 ~~return, in the taxable year immediately following the taxable~~
25 ~~year for which the return is filed; or~~

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1 ~~(b) in the case of amended returns or~~
2 ~~original returns not timely filed, in the first taxable year~~
3 ~~beginning after the date on which the return or amended return~~
4 ~~establishing the net operating loss is filed; and~~

5 ~~(c) in either case, if the net operating~~
6 ~~loss carryover exceeds the amount of net income exclusive of~~
7 ~~the net operating loss carryover for the taxable year to which~~
8 ~~the exclusion first applies, in the next four succeeding~~
9 ~~taxable years in turn until the net operating loss carryover is~~
10 ~~exhausted for any net operating loss carryover from a taxable~~
11 ~~year prior to January 1, 2013; in no event may a net operating~~
12 ~~loss carryover from a taxable year beginning prior to January~~
13 ~~1, 2013 be excluded in any taxable year after the fourth~~
14 ~~taxable year beginning after the taxable year to which the~~
15 ~~exclusion first applies; and~~

16 ~~(5) for taxable years beginning on or after~~
17 ~~January 1, 2013, an amount equal to the sum of any net~~
18 ~~operating loss carryover deductions to that year claimed and~~
19 ~~allowed; provided that the amount of any net operating loss~~
20 ~~carryover may be excluded only as follows:~~

21 ~~(a) in the case of a timely filed~~
22 ~~return, in the taxable year immediately following the taxable~~
23 ~~year for which the return is filed; or~~

24 ~~(b) in the case of amended returns or~~
25 ~~original returns not timely filed, in the first taxable year~~

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1 ~~beginning after the date on which the return or amended return~~
2 ~~establishing the net operating loss is filed; and~~

3 ~~(c) in either case, if the net operating~~
4 ~~loss carryover exceeds the amount of net income exclusive of~~
5 ~~the net operating loss carryover for the taxable year to which~~
6 ~~the exclusion first applies, in the next nineteen succeeding~~
7 ~~taxable years in turn until the net operating loss carryover is~~
8 ~~exhausted for any net operating loss carryover from a taxable~~
9 ~~year beginning on or after January 1, 2013; in no event shall a~~
10 ~~net operating loss carryover from a taxable year beginning: 1)~~
11 ~~prior to January 1, 2013 be excluded in any taxable year after~~
12 ~~the fourth taxable year beginning after the taxable year to~~
13 ~~which the exclusion first applies; and 2) on or after January~~
14 ~~1, 2013 be excluded in any taxable year after the nineteenth~~
15 ~~taxable year beginning after the taxable year to which the~~
16 ~~exclusion first applies;~~

17 ~~J. "net operating loss" means any net operating~~
18 ~~loss, as defined by Section 172(c) of the Internal Revenue~~
19 ~~Code, as that section may be amended or renumbered, for a~~
20 ~~taxable year as further increased by the income, if any, from~~
21 ~~obligations of the United States for that year less related~~
22 ~~expenses;]~~

23 ~~(1) the base income or loss of a corporation~~
24 ~~properly filing a tax return as a separate entity; or~~

25 ~~(2) the combined base income and losses of~~

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1 corporations that are part of a filing group that is computed
2 after eliminating intercompany income and expense in a manner
3 consistent with the consolidated filing requirements of the
4 Internal Revenue Code and the Corporate Income and Franchise
5 Tax Act;

6 ~~[K-]~~ N. "net operating loss carryover" means [the
7 ~~amount, or any portion of the amount, of a net operating loss~~
8 ~~for any taxable year that, pursuant to Paragraph (3), (4) or~~
9 ~~(5) of Subsection I of this section, may be excluded from base~~
10 income] the apportioned net loss properly reported on an
11 original or amended tax return for taxable years beginning on
12 or after January 1, 2020 by the taxpayer:

13 (1) plus:

14 (a) the portion of an apportioned net
15 loss properly reported to New Mexico for a taxable year
16 beginning on or after January 1, 2020, on a separate year
17 return, to the extent the taxpayer would have been entitled to
18 include the portion of such apportioned net loss in the
19 taxpayer's consolidated net operating loss carryforward under
20 the Internal Revenue Code if the taxpayer filed a consolidated
21 federal return; and

22 (b) the taxpayer's grandfathered net
23 operating loss carryover; and

24 (2) minus:

25 (a) the amount of the net operating loss

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1 carryover attributed to an entity that has left the filing
2 group, computed in a manner consistent with the consolidated
3 filing requirements of the Internal Revenue Code and applicable
4 regulations, as if the taxpayer were filing a consolidated
5 return; and

6 (b) the amount of net operating loss
7 deductions properly taken by the taxpayer;

8 O. "net operating loss deduction" means the portion
9 of the net operating loss carryover that may be deducted from
10 the taxpayer's apportioned net income or loss under the
11 Internal Revenue Code for the taxable year in which the
12 deduction is taken, including the eighty percent limitation of
13 Section 172(a) of the Internal Revenue Code calculated on the
14 basis of the taxpayer's apportioned net income or loss;

15 ~~[E-]~~ P. "person" means any individual, estate,
16 trust, receiver, cooperative association, club, corporation,
17 company, firm, partnership, limited liability company, joint
18 venture, syndicate or other association; "person" also means,
19 to the extent permitted by law, any federal, state or other
20 governmental unit or subdivision or agency, department or
21 instrumentality thereof;

22 ~~[M-]~~ Q. "real estate investment trust" has the
23 meaning ascribed to the term in Section 856 of the Internal
24 Revenue Code, as that section may be amended or renumbered;

25 R. "related corporation" means a corporation that

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1 is under common ownership with one or more corporations but
2 that is not included in the same tax return;

3 S. "return" means any tax or information return,
4 including a water's-edge or worldwide combined return, a
5 consolidated return, a declaration of estimated tax or a claim
6 for refund, including any amendments or supplements to the
7 return, required or permitted pursuant to a law subject to
8 administration and enforcement pursuant to the Tax
9 Administration Act and filed with the department by or on
10 behalf of any person;

11 [~~N-~~] T. "secretary" means the secretary of taxation
12 and revenue or the secretary's delegate;

13 U. "separate year return" means a properly filed
14 original or amended return for a taxable year beginning on or
15 after January 1, 2020 by a taxpayer reporting a loss, a portion
16 of which is claimed as part of the net operating loss carryover
17 by another taxpayer in a subsequent return period;

18 [~~0-~~] V. "state" means any state of the United
19 States, the District of Columbia, the commonwealth of Puerto
20 Rico, any territory or possession of the United States or
21 political subdivision thereof or any political subdivision of a
22 foreign country;

23 [~~P-~~] W. "state or local bond" means a bond issued
24 by a state other than New Mexico or by a local government other
25 than one of New Mexico's political subdivisions, the interest

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1 from which is excluded from income for federal income tax
2 purposes under Section 103 of the Internal Revenue Code, as
3 that section may be amended or renumbered;

4 X. "taxable income" means a taxpayer's apportioned
5 net income minus the net operating loss deduction for the
6 taxable year;

7 [Q-] Y. "taxable year" means the calendar year or
8 fiscal year upon the basis of which the net income or loss is
9 computed under the Corporate Income and Franchise Tax Act and
10 includes, in the case of the return made for a fractional part
11 of a year under the provisions of that act, the period for
12 which the return is made;

13 [R-] Z. "taxpayer" means any corporation subject to
14 the taxes imposed by the Corporate Income and Franchise Tax
15 Act; [and

16 S-] AA. "unitary [~~corporations~~] group" means [~~two~~
17 ~~or more integrated corporations, other than any foreign~~
18 ~~corporation incorporated in a foreign country and not engaged~~
19 ~~in trade or business in the United States during the taxable~~
20 ~~year, that are owned in the amount of more than fifty percent~~
21 ~~and controlled by the same person and for which at least one of~~
22 ~~the following conditions exists:~~

23 ~~(1) there is a unity of operations evidenced~~
24 ~~by central purchasing, advertising, accounting or other~~
25 ~~centralized services;~~

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1 ~~(2) there is a centralized management or~~
2 ~~executive force and centralized system of operation; or~~

3 ~~(3) the operations of the corporations are~~
4 ~~dependent upon or contribute property or services to one~~
5 ~~another individually or as a group] a group of two or more~~
6 ~~corporations, including a captive real estate investment trust,~~
7 ~~but not including an S corporation, an insurance company~~
8 ~~subject to the provisions of the New Mexico Insurance Code, an~~
9 ~~insurance company that would be subject to the New Mexico~~
10 ~~Insurance Code if the insurance company engaged in business in~~
11 ~~this state or a real estate investment trust that is not a~~
12 ~~captive real estate investment trust, that are related through~~
13 ~~common ownership;~~

14 BB. "water's-edge group" means all corporations
15 that are part of a unitary group, except:

16 (1) corporations that are exempt from
17 corporate income tax pursuant to Section 7-2A-4 NMSA 1978; and

18 (2) corporations wherever organized or
19 incorporated that have less than twenty percent of their
20 property, payroll and sales sourced to locations within the
21 United States, following the sourcing rules of the Uniform
22 Division of Income for Tax Purposes Act; and

23 CC. "worldwide combined group" means all members of
24 a unitary group, except members that are exempt from corporate
25 income tax pursuant to Section 7-2A-4 NMSA 1978, irrespective

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1 of the country in which the corporations are incorporated or
2 conduct business activity."

3 SECTION 2. Section 7-2A-3 NMSA 1978 (being Laws 1981,
4 Chapter 37, Section 36, as amended) is amended to read:

5 "7-2A-3. IMPOSITION AND LEVY OF TAXES.--

6 A. A tax to be known as the "corporate income tax"
7 is imposed at the rate specified in the Corporate Income and
8 Franchise Tax Act upon the [~~net~~] taxable income of [~~every~~
9 ~~domestic corporation and upon the net income of every foreign~~
10 ~~corporation employed or~~] a corporation or group of
11 corporations, in whatever jurisdiction organized or
12 incorporated, that is engaged in the transaction of business
13 in, into or from this state or deriving any income from any
14 property or employment within this state.

15 B. A tax to be known as the "corporate franchise
16 tax" is imposed in the amount specified in the Corporate Income
17 and Franchise Tax Act upon every domestic corporation and upon
18 every foreign corporation employed or engaged in the
19 transaction of business in, into or from this state or deriving
20 any income from any property or employment within this state
21 and upon every domestic or foreign corporation, whether engaged
22 in active business or not, but having or exercising its
23 corporate franchise in this state."

24 SECTION 3. Section 7-2A-8.3 NMSA 1978 (being Laws 1983,
25 Chapter 213, Section 12, as amended) is amended to read:

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1 "7-2A-8.3. COMBINED AND CONSOLIDATED RETURNS.--

2 ~~[A. A unitary corporation that is subject to~~
3 ~~taxation under the Corporate Income and Franchise Tax Act and~~
4 ~~that has not previously filed a combined return pursuant to~~
5 ~~this section or a consolidated return pursuant to Section~~
6 ~~7-2A-8.4 NMSA 1978 may elect to file a combined return with~~
7 ~~other unitary corporations as though the entire combined net~~
8 ~~income were that of one corporation; provided, however, that~~
9 ~~for taxable years beginning on or after January 1, 2014, a~~
10 ~~unitary corporation that provides retail sales of goods in a~~
11 ~~facility of more than thirty thousand square feet under one~~
12 ~~roof in New Mexico shall file a combined return with other~~
13 ~~unitary corporations as though the entire combined net income~~
14 ~~were that of one corporation. The return filed under this~~
15 ~~method of reporting shall include the net income of all the~~
16 ~~unitary corporations. Transactions among the unitary~~
17 ~~corporations may be eliminated by applying the appropriate~~
18 ~~rules for reporting income for a consolidated federal income~~
19 ~~tax return. Any corporation that has filed an income tax~~
20 ~~return with New Mexico pursuant to Section 7-2A-8.4 NMSA 1978~~
21 ~~shall not file pursuant to this section unless the secretary~~
22 ~~gives prior permission to file on a combined return basis.~~

23 ~~B. Once corporations have reported net income~~
24 ~~through a combined return for any taxable year, they shall file~~
25 ~~combined returns for subsequent taxable years, so long as they~~

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1 ~~remain unitary corporations, unless the corporations elect to~~
2 ~~file pursuant to Section 7-2A-8.4 NMSA 1978 or unless the~~
3 ~~secretary grants prior permission for one or more of the~~
4 ~~corporations to file individually.~~

5 ~~C. For taxable years beginning on or after January~~
6 ~~1, 1993, no unitary corporation once included in a combined~~
7 ~~return may elect, or be granted permission by the secretary,~~
8 ~~for any subsequent taxable year to separately account pursuant~~
9 ~~to Paragraph (4) of Subsection A of Section 7-2A-8 NMSA 1978.~~

10 ~~D. Notwithstanding Subsection A of this section, a~~
11 ~~unitary corporation shall not be required to file a combined~~
12 ~~return pursuant to this section if that unitary corporation:~~

13 ~~(1) has operations in New Mexico at facilities~~
14 ~~that do not provide retail sales of goods; and~~

15 ~~(2) employs at least seven hundred fifty~~
16 ~~employees in New Mexico at such facilities.] Corporations that~~
17 ~~are part of a unitary group shall file a return properly~~
18 ~~reporting and paying tax on taxable income as a worldwide~~
19 ~~combined group unless they properly elect to report and pay tax~~
20 ~~on taxable income as a water's-edge or consolidated group,~~
21 ~~pursuant to department rules and instructions, on the first~~
22 ~~original return required to be filed on or after January 1,~~
23 ~~2020. Corporations electing to file a consolidated return must~~
24 ~~file on that same basis for federal income tax purposes. Once~~
25 ~~a unitary or consolidated group has properly made an election~~

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1 to file as a water's-edge or consolidated group, neither the
2 group nor any of the group's members may file a return on any
3 other basis without permission of the secretary. Corporations
4 that are part of a unitary group filing a group return are
5 jointly and severally liable for the tax imposed pursuant to
6 the Corporate Income and Franchise Tax Act on taxable income."

7 SECTION 4. Section 7-4-18 NMSA 1978 (being Laws 1965,
8 Chapter 203, Section 18) is amended to read:

9 "7-4-18. DETERMINATION OF SALES IN THIS STATE OF
10 SERVICES AND OTHER [THAN TANGIBLE PERSONAL] PROPERTY FOR
11 INCLUSION IN SALES FACTOR.--

12 A. Sales, other than sales [~~of tangible personal~~
13 ~~property~~] described in Section 7-4-17 NMSA 1978, are in this
14 state: [~~if~~

15 ~~A. the income-producing activity is performed in~~
16 ~~this state; or~~

17 ~~B. the income-producing activity is performed both~~
18 ~~in and outside this state and a greater proportion of the~~
19 ~~income-producing activity is performed in this state than in~~
20 ~~any other state based on costs of performance]~~

21 (1) in the case of sale, rental, lease or
22 license of real property, if and to the extent the real
23 property is located in this state;

24 (2) in the case of rental, lease or license of
25 tangible personal property, if and to the extent the tangible

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1 personal property is located in this state;

2 (3) in the case of sale of a service, if and
3 to the extent the service is delivered to a location in this
4 state; and

5 (4) in the case of sale, rental, lease or
6 license of intangible property, if and to the extent the
7 intangible property is used in this state.

8 B. If the state or states of assignment under
9 Subsection A of this section cannot be determined, the state or
10 states of assignment shall be reasonably approximated.

11 C. If the taxpayer is not taxable in a state to
12 which a sale is assigned pursuant to Subsection A of this
13 section or if the state of assignment cannot be determined or
14 reasonably approximated pursuant to Subsection B of this
15 section, that sale shall be excluded from the numerator and
16 denominator of the sales factor.

17 D. The department may promulgate rules as necessary
18 or appropriate to carry out the purposes of this section."

19 **SECTION 5. TEMPORARY PROVISION--PROMULGATION OF RULES.--**
20 Prior to January 1, 2020, the secretary of taxation and revenue
21 shall promulgate rules to administer the provisions of this
22 2019 act.

23 **SECTION 6. REPEAL.--**Sections 7-2A-8 and 7-2A-8.4 NMSA
24 1978 (being Laws 1981, Chapter 37, Section 41 and Laws 1983,
25 Chapter 213, Section 13, as amended) are repealed.

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